EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Steven Hickling	**v**	ASDA Stores Limited

Heard: in Nottingham

On: 30 October 2023 and, in chambers, on 18 December 2023

Before: Employment Judge Ayre
Ms H Andrews
Mr R Jones

Representatives:

Claimant: Mr A Korn, counsel
Respondent: Mr P Sangha, counsel

SECOND REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that the respondent is ordered to pay to the claimant a Compensatory Award of £14,817.21.

REASONS

Background

1. In a judgment sent to the parties on 13 April 2023 ("**the Liability Judgment**") the Tribunal found that the claimant was unfairly dismissed but contributed to his dismissal by 45% so that the basic and compensatory awards should be reduced by 45%. The claimant's claims for disability related harassment were dismissed.

2. The case was listed for a Remedy Hearing on 16 June 2023 ("**the First Remedy Hearing**") and Case Management Orders were made to prepare the case for that hearing.

3. It was not possible to deal with all matters relating to remedy at the First Remedy hearing, due to the large number of areas of dispute between the parties, and the fact that the parties had left preparation for the First Remedy Hearing to the last minute.

4. At the First Remedy Hearing the Tribunal unanimously decided that:

    1. The respondent should pay to the claimant a basic award of £7,180.80.

    2. No order for reinstatement or re-engagement should be made; and

    3. The amount of the Compensatory Award should be determined at a subsequent remedy hearing.

5. The case was listed for a Second Remedy Hearing on 30 October 2023 to decide the amount of the Compensatory Award, and case management orders were made to prepare the case for that hearing.

The Proceedings

6. There was an agreed remedy bundle running to 232 pages. The claimant gave evidence and had prepared a witness statement. Mr Korn had prepared a written skeleton argument, for which we are grateful.

7. The claimant had prepared a Schedule of Loss in which he claimed a Compensatory Award of £31,179.20. The respondent had prepared a Counter Schedule in which it calculated the Compensatory Award as zero.

8. Both parties made oral submissions. There was limited evidence before us as to the pension contributions made by Pertemps and DHL on the claimant's behalf. The pay slips in the bundle contained details of employee pension contributions both while the claimant was employed by Pertemps and when he was employed by DHL. The claimant could not recall how much the employee or employer pension contributions were with either Pertemps or DHL. Both counsel were specifically asked to make submissions on the question of whether the Tribunal should take Judicial Notice of the fact that there is a legal obligation on employers, under the auto enrolment legislation, to make a minimum of 3% employer pension contributions.

The issues

9. In accordance with case management orders made at the First Remedy Hearing, the parties had agreed a List of Issues for today's hearing. We discussed that list at the start of the hearing. The following issues were agreed by the parties:

    a. The claimant's net pay during his 12 week notice period is £5,826.12;

b. The net weekly pay (taking account of pay rises) that the claimant would have received, had he remained employed by the respondent, is as follows:

   i. 7 April 2021 – 30 April 2022: £485.51;
   ii. 1 May 2022 – 31 December 2022: £486.73;
   iii. 1 January 2023 – 6 May 2023: £487.99;
   iv. 7 May 2023 – 30 October 2023: £545.436.

c. After the claimant's employment ended, the respondent implemented a pay increase for employees, which was backdated to April 2020. The claimant did not receive that increase, which the parties agree is in the sum of £740.22;

d. The employer pension contributions made by the respondent into the claimant's pension scheme were 3%;

e. The claimant has lost the benefit of shares under the respondent's Sharesave Scheme in the sum of £7,521.23;

f. The claimant is entitled to compensation for loss of discounted gym membership. The value of the lost gym membership to the date of the Second Remedy Hearing on 30 October is £782.76. The value to the date of the First Remedy Hearing on 16 June is £644.80.

g. The claimant is entitled to compensation for loss of a 10% shopping discount. The value of that loss to 16 June 2023 is £736, and to 30 October 2023 it is £868.32.

h. The claimant is entitled to compensation for loss of the benefit of free eye tests worth £22 a year, a total of £66.

i. The appropriate award for loss of statutory rights is £500.

10. The following issues were not agreed and fell to be determined by the Tribunal:

a. Should the pay due to the claimant in respect of his notice period be reduced to take account of the sums earned by the claimant in mitigation during that period?

b. For what period should the claimant be awarded loss to date? The claimant says up to the date of the Second Remedy Hearing; the respondent says up to the date of the First Remedy Hearing on 16 June 2023.

c. What sum should be awarded by way of pension loss, and what credit should be given for employer pension contributions made by Pertemps and DHL?

d. Is the claimant entitled, as part of the Compensatory Award, to the benefit of back pay in the sum of £740.22 for the period April 2020 to April 2021?

e. Should any future loss be awarded to the claimant? The claimant claims 52 weeks' future loss, the respondent says no future loss should be awarded.

f. Is the claimant entitled to be compensated for loss of free eye tests for his wife, to the value of £66 (£22 a year)?

g. Is the claimant entitled to compensation for the costs of physiotherapy which he says it was necessary for him to pay for in order to obtain and stay in his new role, in the sum of £594?

h. Should the award be subject to an uplift for an unreasonable failure by the respondent to comply with the ACAS Code? The claimant says a 25% uplift is appropriate. The respondent says no uplift should be made.

i. What statutory cap should be applied to the award, if relevant?

Findings of Fact

11. We make the following findings of fact on a unanimous basis.

Notice period

12. The claimant was dismissed by the respondent on 7 April 2021 without notice or payment in lieu of notice. The claimant's contractual and statutory notice entitlement was 12 weeks. Had he been given notice of termination his notice period would have run from 8 April 2021 to 2 July 2021.

13. The claimant's gross weekly pay with the respondent at the date of dismissal was £599.60. His net weekly pay was £485.51. The total net pay that the claimant would have received during his twelve week notice period was £5,826.12. The total gross pay that he would have received during his notice period was £7,195.20.

Mitigation

14. After he was dismissed, the claimant took immediate steps to try and find an alternative role, and on 21 April 2021 he was offered a role working for an employment agency, Pertemps, at the Daventry site of one of their clients, DHL.

15. The claimant began working for DHL through the agency Pertemps on 22 April 2021. He was initially paid £9.97 an hour for a 37.5 hour week. After 12 weeks his pay increased to £10.57 an hour for a 40-hour week. There were subsequently further changes in hourly rates, and on 31 August 2022 he was taken on by DHL as a direct employee on a permanent contract.

16. The claimant remains employed by DHL as at the date of this hearing. His current net weekly pay (which he has been receiving since 31

August 2022) is £455.21. The gross weekly pay that he has been receiving since 31 August 2022 is £576.

17. Since joining DHL, the claimant has applied for promotion. In January 2022 he was successful in an application to become a coach and he is now involved in training new members of staff at DHL. He has also applied twice for first line manager positions at DHL.

18. The claimant is, in our view, likely to remain employed by DHL for the foreseeable future. He was employed by the respondent for 18 years and has a history of stable and long-term employment. There is no evidence before us to suggest that the claimant's employment with DHL will not be long term.

19. The total net pay received by the claimant from Pertemps during the period from 3 July 2021 to 30 August 2022, using the figures set out at the back of the claimant's Schedule of Loss, which we accept, was £25,932.52. There was no evidence before us as to the claimant's gross pay during this period.

Pension

20. Whilst he was employed by the respondent the claimant was a member of a defined contribution pension scheme and the respondent paid 3% employer pension contributions on his behalf. Whilst employed by Pertemps the claimant was enrolled in a defined contribution pension scheme. The pay slips before us indicated that he began making contributions into the pension scheme operated by Pertemps at some point between 16 July 2021 and 13 August 2021.

21. Given that the legal requirement on employers is to auto enroll workers in a pension scheme no later than three months after the start of their employment, we find that the claimant was auto enrolled by Pertemps into a pension scheme from 21 July 2021. We take judicial notice of the auto enrolment pension legislation and also find that Pertemps and subsequently DHL made employer pension contributions of 3% of gross pay from 21 July 2021 onwards.

22. Had the claimant remained employed by the respondent then, taking account of pay rises awarded by the respondent, his net weekly earnings would have been as follows:

    a. Between 1 July 2021 and 30 April 2022 - £485.51;
    b. Between 1 May 2022 and 31 December 2022 - £486.73;
    c. Between 1 January 2022 and 6 May 2023 - £487.99;
    d. From 7 May 2023 onwards - £545.46.

23. There was no evidence before us to suggest that the claimant has received any social security benefits since he was dismissed by the respondent.

Back pay

24. In July 2021 the respondent, having agreed a pay award for employees, paid back pay in respect of a pay increase that had been agreed for the 2020 / 2021 financial year. Had the claimant not been dismissed by the respondent, he would have received in July 2021 back pay for the 2020/2021 financial year in the sum of £740.22 net.

Benefits

25. The claimant was a member of a Sharesave Scheme operated by the respondent. When he was dismissed, he lost his right to participate in the scheme. The financial loss he incurred as a result was £7,521.23.

26. The claimant also lost the right to discounted shopping when he was dismissed. Whilst employed by the respondent he was provided with a colleague discount card that entitled him and one nominated person to a discount of 10% on shopping. The claimant saved an average of £6.48 per week as a result of this benefit.

27. Whilst employed by the respondent the claimant was entitled to gym membership at the cost of £3 per month. Since his dismissal the claimant has paid for membership of a commercial gym. The additional cost to the claimant of paying for gym membership from the date of his dismissal to 30 October 2023 was £782.76. He currently pays £37.49 a month for gym membership, which is £34.79 a month more than he paid for membership whilst employed by the respondent.

28. The respondent provided the claimant and his wife with free eye tests. The value of the free eye tests from the date of dismissal to the date upon which the compensatory award was calculated was £132 (£66 for the claimant and £66 for his wife).

Physiotherapy

29. Between April 2022 and September 2022, the claimant undertook private physiotherapy on his knee at a cost of £594.

The Law

Unfair dismissal compensatory award

30. Section 123 of the Employment Rights Act 1996 ("the ERA") contains the power to make a compensatory award where an employee has been unfairly dismissed, of "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

31. Section 123(2) of the ERA provides that the loss "*shall be taken to include –*

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) *subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal*."

32. In ***Dunnachie v Kingston upon Hull City Council [2004] ICR 1052***, the House of Lords held that compensation for unfair dismissal under section 123 of the ERA cannot include noneconomic loss. The House of Lords approved the finding in ***Norton Tool Co Ltd v Tewson [1972] ICR 501***, that the compensatory award should cover only financial loss that was proven. In ***Norton Tool*** it was however found to be 'good industrial practice' to award full pay in lieu of notice to an employee who has been unfairly dismissed without notice, whether or not the employee has found alternative work during the notice period.

33. The question of whether credit should be given for sums received by the claimant during what would have been his notice period has come before the EAT on a number of occasions. In ***Morgans v Alpha Plus Security Ltd [2005] ICR 525*** the EAT held that incapacity benefits had to be deducted in full from the compensatory award. In ***Hardy v Polk (Leeds) Ltd [2005] ICR 557*** the EAT held that earnings during what would have been the notice period had to be offset against the compensatory award, and in ***Voith Turbo Ltd v Stowe [205] ICR 543*** the EAT, relying on ***Norton Tool***, held that they did not.

34. The ***Norton Tool*** principle that an employee dismissed without notice is not required to give credit for sums earned during what would have been his notice period has been approved by the Court of Appeal in ***Addison v Babcock FATA Ltd [1987] ICR 805*** and ***Langley and anor v Burlo [2007] ICR 390***.

Uplift for unreasonable non-compliance with the ACAS Code

35. Section 124A of the ERA (Adjustments under the Employment Act 2002) provides that:

"*Where an award of compensation for unfair dismissal falls to be –*

(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards)…

the adjustment shall be in the amount awarded under section 118(1)(b)…."

36. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") gives Employment Tribunals the power to increase or decrease compensation payable to an employee in certain circumstances. It applies to proceedings under any of the jurisdictions listed in Schedule A2, which includes complaints of unfair dismissal.

37. The relevant part of section 207A states as follows:

"*(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –*

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

38. The power to increase compensation by up to 25% applies to unfair dismissal compensatory awards. It does not however apply to unfair dismissal basic awards, by virtue of section 124A of the ERA.

39. The term "relevant Code of Practice" includes the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("**the ACAS Code**") which was produced under the authority given to ACAS by section 199 of TULRCA and subsequently approved by the Secretary of State and by Parliament in accordance with section 200 of TULRCA.

40. The ACAS Code contains the following relevant provisions:

"*1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*

- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.…*

4. …whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act **consistently**.*
- *Employers should carry out any necessary **investigations**, to establish the facts of the case.*
- *Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.*
- *Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to **appeal** against any formal decision made…*

Conclusions

41. The following conclusions are reached on a unanimous basis after considering carefully the evidence before the Tribunal, the legal principles summarised above, and the submissions of both parties.

Compensation during the claimant's notional notice period

42. At the time he was dismissed the claimant's gross weekly pay was £599.60 and his net weekly pay was £485.51. The parties were in agreement that, if the claimant had been paid in lieu of notice he would have been paid net salary of £5,826.12 (12 x £485.51).

43. The parties were also in agreement that the respondent contributed 3% of the claimant's pay to a pension on his behalf. Pension contributions of 3% therefore fall to be added to the loss of salary during the notice period. The claimant's gross pay during his notice period would have been £7,195.20 (12 x £599.60) and 3% of this amount is £215.86.

44. The total value of the lost salary and benefits during what would have been the claimant's notice period is therefore £6,041.98 (£5,826.12 + £215.86).

45. The claimant began work on 22 April 2021, just two weeks after being dismissed. He was therefore in paid employment during ten of the twelve weeks of his notional notice period. Mr Sangha submitted that the claimant should give credit for sums earned during his notice period, relying on ***Dunnachie***, although he acknowledged that there are conflicting authorities on the question of whether credit has to be given for sums earned in mitigation during the notice period.

46. Mr Korn, for the claimant, relied upon paragraph 18 of the judgment in ***Babcock FATA Ltd v Addison [1987] IRLR 173*** in which the Court of Appeal, quoting from the judgment of Sir John Donaldson in ***Norton Tool*** held that:

"*In the context of compensation for unfair dismissal we think that it is appropriate and in accordance with the intentions of Parliament that we should treat an employee as having suffered a loss in so far as he receives less than he would have received in accordance with good industrial practice. Accordingly, no deduction has been made for his earnings during the notice period."*

47. ***Dunnachie*** was considered by the Court of Appeal in ***Burlo v Langley*** where the Court held that the narrow principle in ***Norton Tool*** should still be applied in calculating compensation during the notice period in unfair dismissal claims.

48. On balance, the Tribunal considers that it would be just and equitable, and in keeping with the limited exception in ***Norton Tool*** to make no deduction in respect of sums earned by the claimant during his notice period. The claimant is therefore awarded the sum of £6,041.98 in respect of salary and employer pension contributions during what would have been his notice period.

Pension Loss

49. It would, in our view, be entirely appropriate to compensate the claimant for loss of employer pension contributions following his dismissal. The claimant was a member of a defined contribution pension scheme whilst employed by the respondent, so pension loss can be calculated using the employer pension contributions of 3% of gross salary.

50. Credit must however be given for employer pension contributions made in the claimant's new employment with Pertemps and DHL. We find on the evidence before us that the claimant was auto enrolled with a pension with Pertemps on 21 July 2021. We take judicial notice of the fact that both Pertemps and DHL would be required to comply with the legislation on auto-enrolment which requires an employer pension contribution of 3% of salary.

51. We have therefore calculated the claimant's losses taking into consideration 3% employer contributions by Pertemps and DHL from 21 July 2021 onwards.

Period of Loss

52. Mr Korn submitted that loss should be calculated up to the date of the Second Remedy Hearing, 30 October 2023, and that the claimant should also be awarded 12 months' future loss. Mr Sangha suggested that the claimant should only be awarded loss to the date of the First Remedy Hearing in June 2023, on the ground that it was just and equitable to 'draw a line' then.

53. We find that loss should be awarded, in accordance with normal principles, up to the date upon which the compensatory award was calculated, namely 18 December 2023. The mere fact that the Compensatory Award is calculated some considerable time after the dismissal (in this case approximately 2 years and 8 months later) is not in itself grounds for limiting the period of loss. In ***Gilham v Kent County Council [1986] IRLR 56***, the EAT held that a Tribunal was entitled to compensate a successful claimant for the entire period up to the date of the remedy hearing, which in that case was two years and nine months.

54. We are satisfied, on the evidence before us, that the claimant has suffered loss up to the date upon which we calculated the Compensatory Awand that he should be compensated for that loss.

55. We are not persuaded however that there should be an award for future loss. It is now two years and eight months since the claimant's dismissal and it would not, in our view, be just and equitable to award compensation for a longer period of loss. The claimant found alternative work very quickly and has remained employed in the new role ever since. His history of long periods of employment would suggest he is likely to remain employed by DHL for the foreseeable future.

56. The claimant has been successful both in obtaining permanent employment with DHL (having initially started as an agency worker) and in obtaining promotion in that role. There is the potential for him to be promoted again in the future and the possibility of pay rises with DHL.

57. In these circumstances there should, in our view, be no future loss awarded to the claimant. Returning to the words of the statute themselves, it would not be just and equitable in all of the circumstances to award any period of future loss.

Back pay

58. The parties agree that the amount of the back pay the claimant would have received for the period prior to his dismissal was £740.22 net. They are however in dispute as to whether the claimant should be awarded that sum. The respondent's position is that these losses do not arise out of the dismissal, but are, rather a claim for unlawful deduction from wages, and that there is no such claim before the Tribunal.

59. The claimant accepts that there is no claim for unlawful deduction from wages or breach of contract but submits that this sum would have been paid to the claimant had he remained in employment after 7 April 2021 and is therefore a compensable loss under section 123 of the ERA.

60. On balance we prefer the claimant's arguments on this issue. The back pay is in respect of a pay rise awarded, with retrospect, for the period during which the claimant was employed by the respondent. If the claimant had not been dismissed, he would have been paid this award. The loss of the pay award therefore arises in consequence of the dismissal, and it would, in our view, be just and equitable to compensate the claimant for the loss of the award.

61. We therefore award the sum of £740.22 in respect of back pay.

Eye tests

62. The parties agree that the claimant should be compensated for loss of eye tests in the sum of £66 – three years' benefit at £22 a year. They do not agree however that the claimant should be compensated for the loss of this benefit for his wife, which he also put at £22 a year.

63. The claimant submitted that the loss of this benefit for the claimant's wife falls within section 123(2)(a) and/or (b) of the ERA and that there is no reason why, as the benefit was extended to both the claimant and his wife, compensation for loss of the benefit should be limited to the claimant himself.

64. Mr Sangha argued that the Tribunal should award losses to the claimant only, and that his wife's losses should be excluded.

65. There is, in our view, no reason why the loss of a benefit provided to the claimant's wife should be excluded from the Compensatory Award. It is a loss arising in consequence of the dismissal, and it is clear that benefits can be included when calculating losses provided they are not one off payments but were received on a regular basis. There is no general rule that loss can only be awarded in respect of benefits received by the claimant himself. In ***Fox (Father for G Fox (Deceased)) v British Airways [2013] IRLR 812*** the Court of Appeal held that the estate of a deceased claimant could recover compensation for the loss of a death in service benefit payment as part of unfair dismissal compensation.

66. We therefore award the total sum of £132 in respect of loss of the benefit of eye tests, comprising £66 for the claimant's eye tests and £66 for the claimant's wife's eye tests.

Physiotherapy

67. The claimant claims the sum of £594 in respect of physiotherapy costs

68. The respondent objects to an award in respect of these costs. Mr Sangha submits that this is not a cost that the respondent should be liable for, and that the claimant's new employer should have made reasonable adjustments for the claimant such that the physiotherapy was not required.

69. Mr Korn submits that the claimant would not have been able to do his new job without the physiotherapy, and that the treatment was therefore a reasonable way of mitigating his loss. It cannot, he says, be unreasonable for the claimant to have obtained physiotherapy to support him in his new role.

70. Whilst we accept that the claimant did undertake physiotherapy on his knee, the evidence before us does not suggest that he would have been unable to obtain or retain his new employment without that physiotherapy. The claimant has had problems with his knee for a long time and had been able to do his role at the respondent without physiotherapy.

71. Any new employer would, of course, have been subject to make reasonable adjustments to take account of any disabilities, and there was no evidence before us to suggest that the claimant had asked Pertemps or DHL for reasonable adjustments but been refused. Similarly, there was no evidence to suggest that the claimant's knee had got worse as a result of his work with Pertemps / DHL.

72. Importantly, the claimant did not begin the private physiotherapy until approximately one year after he began working at Pertemps / DHL. This suggests that he was able to perform his duties at Pertemps / DHL for a considerable period of time without the need for physiotherapy.

73. For these reasons it would not in our view be just and equitable to make an award in respect of the cost of physiotherapy incurred more than a year after the claimant was dismissed by the respondent.

Uplift

74. The claimant seeks an uplift of 25% for the respondent's failure to comply with the ACAS Code. Mr Korn submits that the respondent failed to comply with the Guidance accompanying the ACAS Code as well as the Code itself. In particular he submits that the respondent failed to carry out any necessary investigations to establish the facts of the case, failed to carry out the disciplinary investigation without unreasonable delay, and that the appeal had not been deal with impartially.

75. In considering the amount of the uplift, Mr Korn says, the Tribunal should take account of the size and administrative resources of the respondent.

76. Mr Sangha submits that the Guidance accompanying the Code complements the Code, but that when considering the amount of an uplift, the Tribunal should take account of the Code alone and not the Guidance. There has, he submits, been no failure to comply with the Code and there should, therefore, be no uplift.

77. In deciding whether to make an uplift, and if so how much, we have had regard to the guidance given by the EAT in ***Rentplus UK Limited v Coulson [2022] IRLR 664***. In that case the EAT held that Tribunals should ask themselves the following questions:

    a. Is the claim one which raises a matter to which the ACAS Code applies:
    b. Has there been a failure to comply with the ACAS Code in relation to that matter?
    c. Was the failure to comply unreasonable?
    d. Is it just and equitable to award an uplift because of the ACAS Code and, if so, by what percentage, up to 25%?

78. The EAT also found that if an employer tries to apply a procedure that complies with the ACAS Code in good faith but makes such a mess of it that the dismissal is unfair, it could be appropriate to award no uplift with the unfairness being compensated by a finding of unfair dismissal. In contrast, if a procedure is applied in bad faith, there is a breach of the ACAS Code.

79. This is a case in which the claimant was dismissed for misconduct. The ACAS Code therefore applies, and there has been no suggestion by either party that it does not apply.

80. We also find that this is a case in which the respondent failed to comply with the ACAS Code by not carrying out the necessary investigations to establish the facts of the case. As we concluded in the Liability Judgment, the respondent failed to investigate or properly

consider the evidence submitted by the claimant during the course of the disciplinary process, which was in effect his mitigation.

81. It is incumbent upon any employer when investigating disciplinary matters to look for evidence of innocence as well as guilt. The respondent failed to do that in this case by dismissing the claimant's mitigation evidence and failing to investigate it. It therefore failed to carry out the necessary investigations to establish whether the claimant had been provoked as he suggested. As a result there was a failure to establish the facts of the case and a breach of the ACAS Code.

82. We have then gone on to consider whether the failure to comply with the ACAS Code was unreasonable. The respondent is a large organisation with a dedicated HR function and significant administrative resources. Whilst considerable steps were taken to comply with the ACAS Code and follow a fair disciplinary procedure, the respondent took a deliberate decision not to investigate the claimant's mitigation evidence.

83. That failure was, in our view, unreasonable. It cannot be said that it was inadvertent or an oversight. Moreover it should reasonably have been clear to the respondent at the time that the claimant placed a lot of importance on that evidence.

84. For these reasons we find that the failure to comply with the ACAS Code was unreasonable.

85. In light of our findings above, we also find that it would be just and equitable to award an uplift under section 207A of TULRCA. In reaching this conclusion we have considered the size of the overall award to the claimant. We consider that an uplift of 10% would be appropriate in the circumstances. This reflects the seriousness of the respondent's failure to comply, but also the fact that the respondent did comply with many of the requirements of the ACAS Code.

86. We therefore award an uplift of 10% for failure to comply with the ACAS Code. That uplift is applied before the 40% reduction for contributory conduct, in line with the 'Adjustments and order of adjustments' set out in the Employment Tribunal Remedies Handbook 2023-2024.

Calculations

87. In light of our conclusions above, we calculate the compensatory award due to the claimant as follows:

    a. Loss of salary and pension during the notice period (8 April 2021 to 2 July 2021): **£6,041.98**.

    b. Loss of salary from 3 July 2021 to 18 December 2023

        i. For the period from 3 July 2021 to 30 April 2022 (43 weeks and 1 day) the claimant would have earned

£485.51 net per week with the respondent and £69.36 a day (485.51 divided by 7). His loss of salary during this period is (43 times 485.51 plus 69.36) £20,946.29.

ii. For the period from 1 May 2022 to 31 December 2022 (35 weeks) the claimant would have earned £486.73 net per week with the respondent. His loss of salary during this period is (35 times 486.73) £17,035.55.

iii. For the period from 1 January 2023 to 6 May 2023 (18 weeks) the claimant would have earned £487.99 per week net with the respondent. His loss of salary during this period is (18 times 487.99) £8,783.82.

iv. For the period from 7 May 2023 to 18 December 2023 (32 weeks and 1 day) the claimant would have earned £545.46 net per week with the respondent and £77.92 a day (545.46 divided by 7). His loss of salary during this period is (32 times 545.46 plus 77.92) £17,532.64.

This gives a total net loss of earnings during this period of (20,946.29 + 17,035.55 + 8,783.82 + 17,532.64) £64,298.30.

c. Pension Loss during the same period. We have calculated this on net earnings as we were not provided with gross earnings for this period. Assuming 3% employer pension contributions, the value of lost pension contributions on the sum of £64,298.30 is £1,928.95.

d. The total loss of earnings and employer pension contributions from the end of the notice period to 18 December 2023 is therefore (64,298.30 + 1,928.95) £66,227.25.

e. From this we have deducted the earnings received by the claimant during this period. This is broken down as follows:

i. For the period from 3 July 2021 to 30 August 2022 (using the figures attached to the claimant's Schedule of Loss) £25,932.52.

ii. From 31 August 2022 to 18 December 2023 (67 weeks and 5 days) the claimant earned £455.21 net per week with DHL and £65.03 a day (455.21 divided by 7). His net earnings during this period were therefore (67 times 455.21 plus 5 times 65.03) £30,822.22.

This gives total net earnings during this period of (25,932.52 + 30,822.22) £56,754.74.

f. Also to be deducted are the employer pension contributions paid from 21 July 2021 to 18 December 2023. We calculate earnings during that period to be £55,587.14, having deducted earnings for the period from 3 to 21 July in the sum of £1,167.60 from the

total earnings of £56,754.74 between 3 July 2021 and 18 December 2023.

3% employer pension contributions on earnings of £55,587.14 is £1,667.61.

g. The total earnings and employer pension contributions during the period from 3 July 2021 to 18 December 2023 is (56,754.74 + 1,667.61) £58,422.35.

h. The difference between what the claimant would have received during the period from 3 July 2021 to 18 December 2023 in salary and pension contributions with the respondent (£66,227.25) and what he actually received (£58.422.35) is £7,804.90. We therefore award the sum of **£7,804.90** in respect of lost salary and pension contributions.

i. We also award the following sums:

   i. Loss of statutory rights : £500

   ii. Back pay : £740.22

   iii. Loss of shares under the Sharesave scheme : £7,521.23

   iv. Gym membership to 30 October 2023 : £782.76

   v. Gym membership from 31 October 2023 to 18 December 2023 – 1.58 months at £34.49 a month : £54.49

   vi. Loss of shopping discount to 30 October 2023: £868.32

   vii. Loss of shopping discount from 31 October 2023 to 18 December 2023 – 7 weeks at £6.48 a week : £45.36

   viii. Loss of eye tests : £132

j. This gives a total loss of (6,041.98 + 7,804.90 + 500 + 740.22 + 7,521.23 + 782.76 + 54.49 + 868.32 + 45.36 + 132) **£24,491.26**.

k. To this we have applied a 10% uplift for failure to comply with the ACAS Code, resulting in an uplifted amount of **£26,940.39**.

l. We have then applied a 45% reduction for contributory conduct, in line with our findings in the liability judgment, resulting in a total payment to the claimant of **£14,817.21**

88. The respondent is therefore ordered to pay to the claimant a compensatory award of £14,817.21.

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Employment Judge Ayre

Case No: 2601439/2021

5 January 2024

JUDGMENT SENT TO THE PARTIES ON

...19 January 2024.....

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FOR THE TRIBUNAL OFFICE